

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUB-REGION 17**

LUCKINBILL, INC.,)	
)	
and)	NLRB Case No. 14-RC-157045
)	
Road Sprinklerfitters Local Union 669,)	
U.A., AFL-CIO.)	

**EMPLOYER’S STATEMENT IN OPPOSITION TO
THE REQUEST FOR REVIEW BY THE ROAD
SPRINKLERFITTERS LOCAL UNION 669, U.A., AFL-CIO**

COMES NOW, Luckinbill, Inc. (“Luckinbill”) and submits its statement in opposition to the request for review by the Road Sprinklerfitters Local Union 669, U.A., AFL-CIO (“Local 669”) of the Regional Director’s Decision and Certification of Results of Election in the captioned case.

INTRODUCTION

The election was held on October 1, 2015 by stipulated agreement. Decision at 1. The bargaining unit in the election agreement was described as: “All full-time and regular part-time employees engaged in the installation, maintenance, service, inspection and repair of fire protection systems employed by the Employer....” Decision at 4. Luckinbill submitted an eligibility list with eight employees. Decision at 1. All eight employees voted, as did one other employee, Eric Oakes, whose ballot was challenged. The tally of ballots of the employees on the eligibility list showed that four votes were cast for Local 669 and four votes cast against Local 669. Decision at 1. Local 669 subsequently filed objections to the election, claiming that two eligible employees, Oaks and Kevin Simpson, were omitted from the Excelsior list. Decision at 1. A hearing on the challenged ballot and objections was held on October 20, 2015. Decision at

1. On November 4, 2015, the Hearing Officer issued a report finding that the challenge to the ballot of Oaks should be sustained, and that the objections of Local 669 should be overruled.

On December 2, 2015, Acting Regional Director Perez issued a Decision and Certification of Results of Election, sustaining the Hearing Officer's Report and Recommendation in this case. Local 669's arguments in its exceptions to the Hearing Officer's report were limited to two issues: (1) Edward Oaks' challenged ballot; and (2) Oaks and Kevin Simpson not being on the Excelsior list. Decision at 1. The Acting Regional Director's Decision and Certification of Results of Election is fully supported by the record evidence, and consistent with Board Law. No review of the Decision is warranted.

ARGUMENT AND AUTHORITY

Proposition I: The Acting Regional Director's Decision adhered to Board Policy and Procedure in Representation Cases.

In its first argument for review, Local 669 again claims that "the parties agreed that dual function employees were eligible to vote and would be included on the Excelsior list." Local 669's Request at 3. Local 669 cites Cooley's testimony at pages 33 and 65 of the Record as its support for this claim. However, this was not Cooley's testimony.

Cooley's testimony at R. 33, l. 3-25 was as follows:

Q: And you understood Ms. Novara worked for the National Labor Relations Board?

A: Yes.

Q: *Was there any discussion about dual function employees with Ms. Novara as you were preparing the voter list?*

A: *Yes.*

Q: Tell us about that.

A: We had two journeymen plumbers that their primary job was as journeymen plumbers, but they also held – one held a fire sprinkler technician's license and one held a fire inspector license. They're both from Lawton. They're both members of Local 344, and I inquired – because I've never had any dealings in this nature before, I inquired of Ms. Novara whether they would be included since they were already part of a union, and she began to discuss

with me dual employees, dual responsibilities, and *she told me that I – they would be allowed to vote*, and if I wanted to challenge them, I could do so, but I would have to wait until the election to do so.

R. 33, l. 3-25.

Nowhere in her testimony at page 33 did Cooley state that she discussed with Local 669 “dual function” employees or that she agreed with Local 669 to allow “dual function” employees to vote in the election. Cooley’s testimony was that Amy Novara, the Board agent conducting the election, talked to Cooley about “dual responsibility” employees and that Novara told her that the two “dual responsibility” employees with fire sprinkler licenses whom Cooley and Novara were discussing would be allowed to vote. There was no agreement by Luckinbill on this point. Novara made the decision that the two “dual function” employees would vote. That was Cooley’s testimony at 33 of the Record.

Plainly, Local 669 misrepresents Cooley’s testimony at page 33. There was no testimony by Cooley that she agreed with Local 669 to put dual function employees on the voter list, or that she even discussed that issue with Local 669. Cooley’s only discussion about dual function employees was with Novara and was specific to two employees with fire sprinkler licenses being on the eligibility list.

Cooley’s testimony at R. 32, l. 2-24 (not cited by Local 669) shows why Cooley included these two dual function employees on the eligibility list – they were both fire suppression technicians listed in Luckinbill’s Fire Suppression Department and they both had fire sprinkler licenses from the Oklahoma Department of Labor:

Q: ... did you have any involvement in preparing the voter list for the election?

A: Yes, I did.

Q: Tell us what you did to prepare that list.

A: *After speaking with Amy Novara, I went through the fire suppression department and put down the techs.*

Q: Okay. In the fire suppression department, I'm looking for a shorthand way to refer to those folks, and I may say fire suppression or fire service technicians or techs. Can you tell us what levels, though, there are in that department?

A: There's the fire sprinkler technician. There's the fire sprinkler apprentice, fire sprinkler trainee, and an inspector.

Q: Okay. And *why did you put down the individuals from that department?*

A: *Because they all had licenses.*

Q: *And how were they licensed?*

A: *Either through the Department of Labor, Oklahoma Department of Labor.*¹

Clearly, Cooley testified that she included all the technicians in Luckinbill's Fire Suppression Department because they all had licenses from the Oklahoma Department of Labor as a fire sprinkler technician, fire sprinkler apprentice, fire sprinkler trainee or inspector. Cooley did not include the eight Fire Suppression Department employees because any of them were dual function employees, but rather because they had fire sprinkler licenses. This testimony was un rebutted by Local 669.

Cooley's testimony at pages 64 and 65 of the Record (Local 669 cited page 65, but not page 64, in its Request) further confirms that there was no agreement between Local 669 and Luckinbill to include all dual function employees on the eligibility list:

Q: (By Ms. Moffett)² And you – and you testified that you agreed with the National Labor Relations Board and Local 669 that dual function employees, i.e., employees who were Local 344 members performing plumbing work and sprinkler work, would be eligible to vote?

A: *No, I did not testify to that. I stated that I discussed dual function employees with Amy Novara. I never said that I said that they could vote. We discussed what they were, and she told me if I wanted to challenge them, I would need to do so at the time of the election, before the election.*

Q: *And you included at least two of those employees on the voter eligibility list?*

A: *I did. That's what I was instructed to do.*

Q: And can you tell me which two those were?

A: Apollos Thomasian and Joey Bales. Joseph Bales. I'm sorry.

Q: *And who instructed you to include them on the list?*

A: *They're part of the individuals who have fire suppression licenses, and Amy Novara said I had to include them.*

¹ The State of Oklahoma licenses individuals to perform sprinkler work. R. 61, l. 20 – 62, l. 4; R. 68, l. 4-11; Company Ex. 3.

² Natalie Moffett is one of the attorneys representing Local 669.

Q: And you – who told you who had licenses or is that just common knowledge in our management division?

A: We have to have copies of all licenses. We're supposed to have copies of all trade licenses. A lot of our contactors require those.

R. 64, l. 14 – 65, l. 21.

As can be readily seen, Cooley's testimony is not what Local 669 represents. Cooley affirmatively testified that she did not agree with Local 669 to include dual function employees on the eligibility list. Cooley testified that Thomasian and Bales were included because they both have fire suppression licenses and Novara told her to include both on the eligibility list.

Contrary Local 669's claim, Luckinbill did not "purposefully omit" two dual function employees – Oaks and Simpson, from the eligibility list, as Local 669 claims. Oaks and Simpson were not a part of the discussion between Cooley and Novara. Cooley testified that neither she nor Novara raised any questions about other employees who might be dual function employees.³ R. 34, l. 22 – 35, l. 5. It would have been impossible for Luckinbill to omit two employees who were never even discussed in regard to the eligibility list.

Local 669 ignores the dispositive distinctions between Oaks and Simpson, and the employees who were on the eligibility list – working in Luckinbill's Fire Suppression Department and holding a fire sprinkler license. It is undisputed that neither Oaks nor Simpson are in Luckinbill's Fire Suppression Department or possess a fire sprinkler license. R. 57, l. 9 – 58, l. 6; Company Ex. 2 (Oaks' licenses).

Local 669's argument about an agreement to include dual function employees in the bargaining unit rests entirely on its misrepresentation of Cooley's testimony. The actual testimony by Cooley states the opposite – there was no agreement to include dual function

³ Cooley also testified that prior to the election she had correspondence with Local 669's attorneys about the eligibility list. Cooley sent the eligibility list to Local 669's attorneys. Cooley testified that Local 669's attorneys did not ask her any questions about dual function employees and did not complain about any individuals being omitted from the voter list. R. 35, l. 6 – 36, l. 7.

employees. Cooley testified that the employees who were put on the eligibility list were all employees of the Fire Suppression Department and all possessed fire sprinkler licenses. Cooley testified that Novara instructed her to put Thomasian and Bales on the eligibility list. Local 669's argument about a supposed agreement on dual function employees is not supported by the record evidence and thus Local 669's first argument for review fails.

Local 669 contends that the Acting Regional Director's note that Local 669 could have objected to the exclusion of Oaks and Simpson prior to the election was somehow inconsistent with the new Board election rules which favor holding hearings on election issues after the election. Local 669 Request at 4. However, in the next sentence in its Request, Local 669 admits that it discovered evidence that these two employees performed some work that Local 669 considered to be bargaining unit work "just prior to the election." Request at 4. Local 669 still does not explain why it could not have objected before the election to Oaks and Simpson not being on the voter list. There is nothing inconsistent between the Acting Regional Director's comment that Local 669 could have raised an objection in regard to these two employees not being on the voter list, and the new election rules. Even Local 669's quotation of NLRB Rules & Regulations § 102.64 at pp. 4-5 of the Request shows this. Local 669 quotes § 102.64 as stating: "the purpose of the pre-election hearing is to determine if a question of representation exists and provides that disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted." This quote does not state that a party may forego raising an objection of which it is aware until after the election. Rather the quoted portion of the regulation states that litigation of disputes of eligibility to vote will be resolved after the election, which is what occurred here.

Local 669 did not present evidence at the hearing to prove that either Oaks or Simpson performed sufficient bargaining unit work to meet the standard for a dual function employee such that either should have been included on the voter list. Decision at 2-3. The Acting Regional Director found that Oaks spent less than 1% of his time performing fire sprinkler work, and Simpson performed fire sprinkler work only 11.5% of his work time. The Acting Regional Director found consistent with Board case law that these percentages were far below the standard for a dual function employee. Decision at 2.

The Decision is not a departure from Board precedent and is not clearly erroneous on the record. Therefore, there are no grounds for review of the Acting Regional Director's Decision.

Prop. II: The Acting Director's Decision did not Inappropriately Shift the Burden of Proof to the Union.

Despite the fact that the record evidence shows that Oaks and Simpson are not dual function employees and never should have been on the eligibility list, Local 669 contends that the testimony of Luckinbill's president, whom Local 669 did not subpoena, was somehow required to support the evidence that Oaks and Simpson are not dual function employees. Local 669 then argues that it is Luckinbill's fault that its president did not testify and that should be held against Luckinbill. As with Local 669's other claims, this argument is an attempt by the Union to gain review based on a procedural argument rather than the substance of the record evidence which shows that neither Oaks nor Simpson were dual function employees. Since the record evidence overwhelmingly supports the Acting Regional Director's decision that Oaks and Simpson did not meet the Board's standard for dual function employees, insubstantial procedural arguments are all Local 669 has to assert.

Local 669's argument about Luckinbill's President not testifying lacks any support in Board law. There is no rule requiring the employer to bring all of its management personnel to a

hearing. Likewise, there was no way that Luckinbill could have anticipated Local 669's line of questioning of Cooley that Local 669 uses as a basis for this argument. Cooley testified, on cross-examination by Local 669's counsel, that she included Thomasian and Bales on the eligibility list because "(i)t was the decision of our president to include them on the list because they're licensed." R. 295, l. 13-15. The Hearing Officer then asked Cooley this question (R. 295, l. 16-21):

Q: So you're saying the distinction was because they were licensed is why they were on the list; is that correct?

A: And they – yes. They're licensed and they're doing sprinklerfitter work.

Thus, the decision for why Thomasian and Bales were on the voter list is clear in the record. Both are licensed sprinkler fitters. There is no evidence contradicting this record evidence, or for that matter, even questioning Cooley's credibility. The Hearing Officer found Cooley to be a credible witness. Report at 6,7 and 10.

From three lines of testimony by Cooley about the president's decision to include Thomasian and Bales, Local 669 attempts to construct an adverse inference argument, referring to a supposed "strategic decision" by Luckinbill to have Cooley testify instead of the company president.⁴ There is no record evidence on any such "strategic decision." Cooley prepared the eligibility list and dealt with Novara on the list and the election. Therefore, it was a logical conclusion that Cooley was a fact witness who should be available to testify at the hearing. There is no evidence that the president created the eligibility list or spoke to Novara.

In *West Oakland Home, Inc.*, 307 NLRB 288, 298 (1992), cited by Local 669, the Board found that an adverse inference could be made where a witness's "absence was unexplained." Here, Local 669 questioned Cooley about why Thomasian and Bales were on the eligibility list,

⁴ Local 669 incorrectly claims that this testimony was in Luckinbill's rebuttal case. This testimony by Cooley was during the portion of the hearing in which Luckinbill presented its case on Local 669's objections.

and she answered. There was no need to have Dennis Luckinbill, the company president, also answer this question. Cooley was part of the discussion with Dennis Luckinbill on including Thomasian and Bales on the list. Hence, this is not an “unexplained absence” situation where evidence on a potentially material issue is missing. The record evidence fully discloses why Thomasian and Bales were on the voter list.

If any party made a strategic decision about how to approach the eligibility list, it was Local 669. Cooley sent the eligibility list to Local 669’s attorneys prior to the election. Local 669’s attorneys did not ask Cooley any questions about dual function employees and did not complain about any individuals being omitted from the voter list. R. 35, l. 6 – 36, l. 7.

As to the reason Oaks and Simpson should not be on the voter list, again the record amply demonstrates that neither met the standard for dual function status. Luckinbill provided both documentary evidence (time records and work sheets) and testimony (Cooley) to support the Acting Regional Director’s finding that neither Oaks nor Simpson were dual function employees. Testimony from Dennis Luckinbill would not have added anything material to this evidence.

The record evidence showed that neither Oaks nor Simpson met the dual employee standard. Local 669 failed to prove otherwise. No grounds exist for granting review of the Acting Regional Director’s decision.

Prop. III: The Acting Regional Director’s Decision did not Ignore Local 669’s Primary Argument.

Local 669 argues that the Acting Regional Director “ignored and failed to address the Union’s argument that the Employer arbitrarily included some, but not all, dual-function employees on its Excelsior list.” Request at 6. To the contrary, the Acting Regional Director’s Decision specifically addressed this argument by Local 669 at page 3 where the Decision states:

In its exceptions, Petition argues that the hearing officer erroneously concluded that the Employer did not purposely omit employees Oaks and Kevin Simpson (Simpson) from the voter eligibility list. Petitioner asserts that because employees Joseph Bales (Bales) and Apollos Thomasian (Thomasian) were included on the Employer's voter eligibility list as dual function employees, that employees Oaks and Simpson should have been included on the list as well.

Thus, Local 669's complaint is that the Acting Regional Director did not agree with its argument. This is not a ground for review of the Acting Regional Director's Decision. NLRB Regulation § 102.67(d). As stated, the record evidence overwhelmingly demonstrates that neither Oaks nor Simpson met the Board test for dual function employees and thus were properly omitted from the eligibility list. Decision at 2-3. Local 669 has not shown that the Acting Regional Director's decision that Oaks and Simpson did not meet the dual function employee standard is a departure from Board precedent or clearly erroneous on the record. NLRB Regulation § 102.67(d).

The burden to demonstrate dual function status was on Local 669 as it was the party asserting that Oaks and Simpson had such status. *Harold J. Becker Co.*, 342 NLRB 51, 52 (2004) ("That suffices, we believe – especially where a stipulated unit is involved – to place the burden on the employer to establish that the challenged employees are nevertheless eligible to vote, as the Employer seeks to do here, by asserting that the employees have dual-function status.".)⁵ Local 669 failed to show that Oaks or Simpson spent 25% or more of their time performing unit work, i.e. sprinkler fitter work. Decision at 2-3. *See also Avco Corp.*, 308 NLRB 1045 (1992).

⁵ Local 669 cites *Harold J. Becker Co.*, *supra*, and *Specialty Healthcare and Rehab. Center*, 357 NLRB No. 83, for the proposition that the burden of proof should be on Luckinbill because it has access to relevant records. This argument ignores that fact that Local 669 issues subpoenas duces tecum to Luckinbill and Cindy Cooley, individually, Luckinbill produced records in response to the subpoenas, and counsel for Local 669 withdrew any outstanding portions of the subpoenas at the close of the hearing. R. 304, l. 22 – 305, l. 24.

Moreover, Local 669's argument that inclusion of Bales and Thomasian on the voter list, but not Oaks and Simpson, was arbitrary is not supported by the record evidence. Indeed the record demonstrated that Bales and Thomasian were included on the voter list because both held fire sprinkler licenses from the State of Oklahoma, which all eight employees on the voter list had, but which neither Oaks nor Simpson possessed. R. 34, l. 1-13; Company Ex. 4 (Thomasian's Licenses). As the Hearing Officer noted, "Oaks does not hold a fire sprinkler trainee, technician, or inspector license," and Simpson testified that he too is "not licensed to perform fire sprinkler work." Report at 4, 11; see also R. 187, l. 18-20. This a key distinction between Oaks and Simpson, and the eight employees on the eligibility list all of whom possess state licenses to perform fire sprinkler work.

There was no reason for Cooley to have considered Oaks or Simpsen when she was preparing the eligibility list. As Cooley's testimony shows, she looked at the eight employees in the Fire Suppression Department to prepare the eligibility list. R. 31, l. 25 – 32, l. 24. She recognized that two of the employees, Thomasian and Bales, were journeymen plumbers as "their primary job" although "one held a fire sprinkler technician's license and one held a fire inspector license." R. 33, l. 11-15. Cooley testified that she asked Novara if Thomasian and Bales would be included on the voter list since they were already part of a union, and that Novara told her they would be allowed to vote. R. 33, l. 16 – 34, l. 13.

Thus the record evidence demonstrates this was not a situation in which the employer arbitrarily excluded individuals from the voter list. To the contrary, the fact that only employees with state fire sprinkler licenses were included is a rationale, clear and objective reason for Oaks and Simpson not appearing on the voter list.

Moreover, comparison with other employees cannot suffice for the failure of Local 669 to prove the Oaks and Simpson were dual function employees. None of Local 669's cited cases support a comparative analysis between employees on a voter list and those not on the voter list.

The inclusion of Thomasian and Bales on the voter list, but not Oaks or Simpson is not an "arbitrary, heterogeneous, or artificial grouping of employees," as discussed in *Turner Industries Group, LLC*, 349 NLRB 428 (2007), one of the cases cited by Local 669. The record shows that Thomasian and Bales held fire sprinkler licenses, like the other six employees on the eligibility list, while Oaks and Simpson worked lacked state fire sprinkler licenses and performed little sprinkler work. Oaks worked as a plumber, while Simpson worked as a HVAC tech. Report at 3, 11. There is nothing arbitrary or artificial about the list of eligible voters compiled by Cooley at Novara's direction. Further, this petitioned-for unit in this case is not a multi-craft unit like the unit in *Turner Industries Group*. Local 669 sought a unit of sprinkler fitter employees. That is the group of employees included on the eligibility list. Local 669 cannot now complain about the list simply because it failed to gain enough votes for the union.

Brenmar Construction, Inc., 2007 NLRB Reg. Dir. Dec. LEXIS 328 (2007), does not support Local 669's argument to include Oaks and Simpson on the voter list. In *Brenmar Construction*, the Regional Director rejected the union's petitioned-for unit as not an appropriate unit for bargaining. Unlike this case, the Regional Director in *Brenmar Construction* found that "the Employer's records, as to the distinctive type of work actually performed by each of the Employer's employees, is vague at best." That is not the case here as Luckinbill's records showed the percentage of bargaining unit work performed by both Oaks and Simpson.

Hydro-Temp Mechanical, Inc., 2013 NLRB Reg. Dire. Dec. LEXIS 147 (2013), also cited by Local 669, does not support Local 669's argument. In this case, the employer sought to

include six dual function employees in a petitioned-for unit of sheet metal workers over the union's objection. The evidence in the case showed that five of the six employees spent at least 60% of their work time doing sheet metal work, and the Regional Director found that these five employees should be included as dual function employees. As discussed, the sprinkler work by Oaks and Simpson falls well short of those percentages, demonstrating further that there was not an "arbitrary selection" of employees for the voter list by Cooley.

CONCLUSION

WHEREFORE, Luckinbill, Inc. requests that Local 669's Request for Review be denied.

Dated: December 23, 2015.



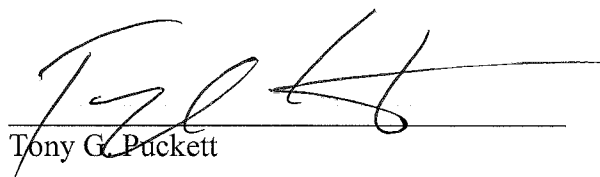
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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2015, the foregoing Statement in Opposition was filed electronically with the National Labor Relations Board via the Board's e-filing portal and a copy served on by regular mail and email on Counsel for the Road Sprinklerfitters Local Union 669, U.A., AFL-CIO, at the address below:

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